

ORIGINAL

BEFORE THE
COPYRIGHT ROYALTY BOARD
WASHINGTON, D.C.

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Copyright Royalty Board

In the Matter of)
)
Distribution of the 1999 and) Docket No. 2008-5 CRB SD 1999-2000
2000 Satellite Royalty Funds)

In the Matter of)
)
Distribution of the 2001, 2002 and) Docket No. 2005-2 CRB SD 2001-2003
2003 Satellite Royalty Funds)
)
)

**INDEPENDENT PRODUCERS GROUP'S COMMENTS TO PHASE I PARTIES'
REQUEST FOR COLLATERAL PROCEEDING OR FURTHER DISTRIBUTION.**

The self-designated "Phase I Parties" have proposed initiation of a collateral proceeding solely to determine if Independent Producers Group ("IPG") has *any* standing to participate in the 1999-2003 satellite royalty proceedings or, alternatively, a further distribution of funds to the Phase I Parties. The Copyright Royalty Board must look no further than IPG's two prior briefs to determine IPG's position on these matters. As noted previously:

"IPG desires to communicate that it remains willing, able and ready to resolve both Phase I and Phase II disputes. However, it cannot do so in the absolute absence of any substantive cooperation by third parties. While third parties may refuse to negotiate with IPG, they may not then present a fiction to the CRB and claim that they have settled all Phase I matters."

Following the CRB's prior Order regarding this matter, little has changed. IPG's efforts

to communicate with the Phase I Parties in order to effect a solution have been met only with this new motion. While IPG's attempt to merely schedule a conference call with two of the motion's signatories was rebuffed as inconvenient, time was found for these same signatories to draft and submit a motion to the CRB. Clearly, no regard is being given to use of the CRB's time, and on this basis alone the CRB would be justified in rejecting the motion of the Phase I Parties.

1. **IPG does not oppose a "collateral proceeding" subject to the required participation of other devotional claimants.**

Without acknowledging the proprietary of any "collateral proceeding", IPG welcomes the opportunity to present evidence to the CRB to demonstrate both the validity and extent of its claims in the Devotional Programming category. However, in the interest of fairness, IPG believes that if IPG is required to so appear and validate the existence and extent of its claim, so should all other claimants in the Devotional Programming category. The reason for this request is obvious.

For purposes of addressing the issue of who is a proper representative of the Devotional Programming category, it will be insufficient for IPG to demonstrate that it merely has *any* interest in the Devotional Programming category, it must demonstrate that it has a *significant* interest in the category such as would warrant IPG's consent in order for a settlement of the Devotional Programming Phase I interest. IPG may only demonstrate such *significant* interest by comparing its interests to the interests of the other devotional claimants.

Consequently, if the true purpose of the collateral proceeding is to address whether IPG has an interest *significant* enough to require its consent for Phase I settlement purposes, participation by the other devotional claimants is necessary. The undersigned hereby represents

that IPG has offered to identify its represented programs but, to date, the devotional claimants have thusfar refused IPG's requests to identify the list of programs that they are making claim for, a necessary first step for comprehensively (and accurately) determining the value of any claimant's claim. While IPG has done its best to deduce this information, its analysis is necessarily limited.

2. IPG's alternative solution, waiver of the confidentiality of prior Phase II settlements in the Devotional Programming category, has apparently been rebuffed by the devotional claimants.

A rather simple solution proposed by IPG was for certain of the existing moving devotional claimants to consent to waive the confidentiality of settlement agreements with IPG for Phase II devotional claims for both cable and satellite proceedings. Such settlements occurred even when certain of IPG's more valuable properties were not yet part of its catalogue. While the settlements are contractually confidential, if the parties thereto (all of which are represented in the motio) will consent to a request by the CRB, IPG will *gladly* consent to waive such confidentiality in order that IPG may substantiate its assertion that it has a significant, indeed the largest, interest in the Devotional Programming category.

Although any collateral proceeding can likely be accomplished on a more expedited basis, at a cost of time, effort and expense less than a full proceeding, an alternative to this could simply be for the CRB to formally request that the existing devotionals agree to consent to waive the confidentiality of prior settlement agreements with IPG for Phase II devotional claims. Coupled with each devotional claimant's explanation as to why its claims have expanded or shrunk, the CRB could have sufficient information to determine whether IPG has a significant

interest in the Devotional Programming category.

Prior to institution of a collateral proceeding, the CRB should formally request that the existing devotionals agree to consent to waive the confidentiality of settlement agreements with IPG for Phase II devotional claims.

3. **The CRB must provide guidance regarding which parties may represent a Phase I category.**

As noted previously, the situation forced by the prior motions of the self-designated "Phase I Parties" raise an ever-present problem with the Phase I/Phase II process of distribution. Obvious questions arise: Can any claimant having previously filed comments on the existence of a Phase I controversy settle claims on behalf of the entire category? What if one (or more) relatively unaffected claimant desires a Phase I settlement for an expeditious payoff, while a more affected claimant rejects the Phase I settlement?

The moving parties' previously asserted that IPG's Phase I claims should be ignored because IPG has not previously participated in any Phase I or Phase II satellite proceedings, but then acknowledged that there have been no satellite proceedings. The moving parties' previously asserted that until IPG has established the validity of its claims *within* its category, in a litigated proceeding, it should not be allowed to participate in a Phase I proceeding. Taken to its logical end, must a party such as IPG, which assertedly holds the largest (and majority) interest in the devotional category since 1998, accept the determination of minority interest holders for all Phase I pools that the minority holders can settle before IPG is given the opportunity to establish its 1998 Phase II interest? Must a significant interest holder tacitly accept the determination of parties with vastly smaller interests for, perhaps, ten years? By the time a litigated Phase II

proceeding occurs, IPG's opportunity to address the Phase I devotional claims of the prior fifteen years may have passed. The failings of this proposal are obvious.

4. IPG has *already* provided a reasonable basis for objecting to the ostensible Phase I settlement.

By the admission of the moving claimants, the noticed Phase I "settlement" settles claims to over \$400 Million. By the admission of the moving claimants, IPG was provided a mere *five hours* to review the proposed settlement and provide any comments. Basic inquiries by IPG such as "has there been any analysis to rationalize such appropriation to the devotional category" were met with the dismissive response that "this is confidential". The basic inquiry as to whether the devotionals that were party to prior partial settlements have self-distributed royalties only to themselves, rather than deposit such royalties into an account reserved for the category of claimants, was responded to with "this is confidential." IPG received absolutely zero substantive information regarding the basis for the settlement, or dollar amount of the settlement - - simply empty reassurances that IPG should agree thereto, coupled with the devotionals' refusal to support (or even agreement not to oppose) IPG's request for a partial distribution if the settlement were accepted, in order that IPG receive an advance distribution in the identical manner as *each and every one* of the devotionals signing on to the proposed settlement.

Following the prior ruling of the CRB, the logical response would have been for the Phase I parties to contact IPG and attempt to alleviate any reservations that IPG may have regarding the proposed settlement. The reasonable response of the "Phase I Parties" would have been to attempt to convince IPG of the soundness of the proposed settlement. However, not only have the "Phase I Parties" not contacted IPG, two of their representatives have made no effort to

respond to IPG's overtures of discussion.

These facts already reflect more than ample bases for IPG's reasonable objection to the proposed settlement. Not only have IPG's actions been reasonable, the actions of the "Phase I Parties" are inherently *unreasonable*.¹

5. The CRB cannot reasonably approve a settlement agreement that it has not seen.

The Phase I Parties also ask that the CRB exercise authority to deem the asserted settlement agreement amongst these parties as reasonable, and impose it upon IPG. Such authority, it is argued, exists pursuant to authority ostensibly granted by 17 U.S.C. Section 801(b)(7)(A), as interpreted by legislative comments.

The obvious factor missing in such circumstance, however, is that the Phase I Parties have presented *no information* to the CRB regarding the proposed settlement agreement other than the fact that they agree with the unidentified amount to be accorded to the Devotional Programming category, and IPG does not. [In all fairness, IPG's position is that it has not been provided sufficient information to evaluate the proposal.] On this basis alone, the Phase I Parties' argument fails, as the CRB would be remiss in its duty if it were to approve a settlement, sight unseen, based solely upon these facts.

6. The "Phase I Parties" rely on numerous irrelevant and misstated arguments.

A. The June 26, 2006 Order of the Copyright Office.

¹ The actions of the "Phase I Parties" bely an ulterior motive to "cut off the water" to IPG, demonstrated by the "Phase I Parties'" consistent attempts to exclude IPG from any access to any retransmission royalties.

In but another misguided attempt to steer the CRB away from the actual issues at hand, the "Phase I Parties" assert that IPG previously made an "unauthorized sur-reply", then complain that it was received late. This allegation provides a segue to a gratuitous reference to the June 26, 2006 Order of the Copyright Office.

The June 26, 2006 Order issued by the Copyright Office provided an inexplicably extended, very harsh criticism of IPG's conduct. To put the Order in context, such Order was the response to IPG's request for the Copyright Office to accept a late-filed document because (i) the only notice to IPG that it was required to make the filing was provided from the Copyright Office *by email*, and was not immediately seen, (ii) the document that was ordered to be filed by IPG required IPG's review of approximately 40 other filings, for which IPG was to provide a summarized response thereto, (iii) the Copyright Office simultaneously ordered IPG to search its records and identify all of the claimants that it represented in the Joint Sports Category, and file a report in connection therewith, (iv) IPG was given only *three* business days to file its responses to both Orders, (v) IPG resides outside of Washington, D.C., and email filing was not permitted, (vi) 33 parties were required to be simultaneously served the documents, and (vii) IPG filed the filing *less than three hours late*.

IPG genuinely misunderstood that the filed document need only have been served by the identified date, not filed, but still satisfied the leviathan task and filed the ordered document *less than three hours late*. Moreover, the particular filing was of a nature that other parties' late-filed documents had been accepted after being more than two *years* late-filed, and the initial need for IPG to make the filing occurred only because the Copyright Office admittedly neglected to serve IPG with multiple Orders requiring IPG response (for which 33 other Phase I Parties were given

three months to respond), and unadmittedly specifically misinformed IPG whether a filing was required in response to IPG's *explicit written request inquiring about the same*. See "IPG's Motion to Accept Late-Filed Responses to the September Orders", filed on or about February 14, 2006, and "IPG's Motion to Reconsider Denial of Motion for Acceptance of Late-filed Response to the September Orders", filed on or about July 1, 2006.

The Copyright Office waited more than four months to render its determination that IPG's filing, filed *less than three hours late*, would not be accepted on grounds of prejudice to the other parties. A more self-serving document than the June 26 Order could not have been authored by the Phase I Parties, and IPG remains perplexed as to any explanation for the ongoing tirade of the Order other than the personal animus of the author.

B. IPG's participation in prior proceedings.

The "Phase I Parties" also mislead the CRB regarding IPG's prior participation in CARP proceedings. According to the Phase I Parties, in a brief filed in October 1999, IPG perjured itself and asserted that it represented such notable producers such as "DreamWorks, A&E Television, and the Academy of Television Arts and Sciences".

In fact, however, IPG did represent such parties, and the statement was not asserted or intended as a statement that any of those parties had claims in the upcoming 1997 Cable royalty proceedings (none had even filed claims in July 1998), but rather to refute an allegation by the Motion Picture Association of America, a signatory hereto, that IPG's claims should be disregarded as some sort of fly-by-night organization.

Moreover, IPG presented a unique situation to the CARP, as an assignee of retransmission royalty collection rights. As an assignee, IPG never purported to be a copyright

owner of the programs generating the 1997 cable retransmission royalties, but merely the holder of a narrow subset of the copyright rights. At the outset of the proceedings, the Copyright Office, as a prerequisite to IPG's program claims, required that IPG provide sufficient written evidence to demonstrate that IPG had the authority to represent the owners of programs for which IPG was making claim, and that such authority existed prior to July 31, 1998. IPG presented all its files, reflecting correspondence to substantiate such timely representation. However, after the three-person CARP made its ruling, the Copyright Office modified its ruling to clarify that it required evidence that the actual written agreement between IPG and the underlying copyright owner had been executed prior to July 31, 1998, and remanded the CARP's decision for modification. Despite IPG's demonstrable authority to make claim on behalf of several parties, the modified ruling necessarily scaled back IPG's claim to include only the programming of a single copyright owner.²

Among several other matters, IPG filed an appeal challenging this determination. Nevertheless, an agreement was reached between the Motion Picture Association of America and an unauthorized minority interest holder in IPG which resulted in the withdrawal of such appeal contingent on all prior determinations of the CARP and Copyright Office being deemed of no precedential value. Ironically, these determinations are now being cited as precedent by the

² Irrespective of which programs were allowed to be claimed by IPG, the three-person CARP also substantially adopted the methodology advocated by IPG, and awarded IPG royalties equal to 100x the amount that would otherwise have been awarded if the MPAA methodology had been adopted. The Nielsen Media Research-based MPAA methodology was rejected after IPG demonstrated that it attributed "zero viewing" to 73% of all broadcasts, with such disparate results as only 1% "zero viewing" to WTBS Atlanta, and 96% "zero viewing" to flagship station WNBC New York.

Phase I Parties, one of which was a signatory to the agreement, and two more of which are arguing serve as the basis for dismissal of all 1997-99 IPG claims in unrelated Phase II categories.

Contrary to the suggestion of the Phase I Parties, no subterfuge or perjury has ever been involved in IPG's proceedings, and no misrepresentation has ever occurred as to exactly which rights are controlled by IPG. Indeed, it is the Phase I Parties who are attempting to mislead the CRB as to what proceedings have previously transpired.

CONCLUSION

The effort that has been expended at excluding IPG from any substantive involvement, and fielding predictable challenges by IPG to forced settlements, exceeds the effort required to simply involve IPG. More to the point, IPG has yet to receive any contact from any of the moving parties in order to resolve any of the issues presented to the CRB. Such actions bely a motive ulterior to the moving parties' stated desire to "encourage settlements".

While a more expeditious alternative exists (review of prior confidential settlement agreements), IPG does not object to a collateral proceeding, provided that all other devotional claimants are required to participate. While a tentative Phase II resolution may seem premature to the institution of Phase I proceedings, IPG welcomes the opportunity to demonstrate the existence and strength of its claims relative to the other devotional claimants. This requires, however, the participation of other devotional claimants.

Nonetheless, IPG must reiterate that all of the foregoing is unnecessary if the Phase I Parties simply reevaluate their collective tack of attempting to squeeze out IPG, and instead treat IPG with the professionalism of a party that represents the interests of more than 250

independent producers of extraordinary caliber.

Respectfully submitted,

Dated: January 10, 2009

A handwritten signature in black ink, appearing to read "Brian D. Boydston", written over a horizontal line.

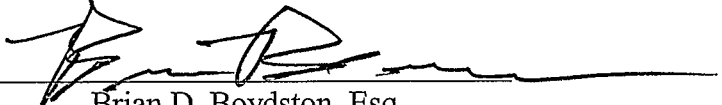
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CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of January 2009, a copy of the foregoing "Independent Producers Group's Comments to Phase I Parties Request for Collateral Proceeding or Further Distribution" was sent by overnight Express Mail to the parties listed on the attached Service List.


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